COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2795 **Cir. Ct. No. 2002CV8100**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BARBARA A. KRAUSE,

PLAINTIFF-APPELLANT,

COMPCARE HEALTH SERVICES INSURANCE CORPORATION,

PLAINTIFF,

V.

WISCONSIN COMPENSATION FUND,

DEFENDANT,

ERIC S. GAENSLEN, M.D., AND MIDWEST MEDICAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Barbara A. Krause appeals from a judgment based on a jury verdict that found Dr. Eric S. Gaenslen was not negligent in his treatment of Krause on May 5, 1999. Krause claims that the trial court improperly refused Krause's request that a *res ipsa loquitur* jury instruction be given to the jury. Because we conclude that the trial court properly determined that Krause was not entitled to a *res ipsa loquitur* instruction, we affirm.

BACKGROUND

¶2 Krause injured her elbow in a fall on May 18, 1998. Krause's elbow injury required three surgeries, all of them performed by Dr. Gaenslen. When after the second surgery, Krause's injury continued to fail to heal properly, Dr. Gaenslen decided that a three-phase procedure was required which involved decompression of the ulnar nerve, replacement of the right radial head of the humerus with a titanium prosthesis, and the placement of an external fixator to partially immobilize the elbow joint during healing. During the third phase of the third surgery, Dr. Gaenslen needed to insert pins into Krause's humerus bone in order to connect the external fixator. To do this, Dr. Gaenslen was required to drill into Krause's humerus to insert the necessary pins. Dr. Gaenslen, in preparation to drill into Krause's humerus, attempted to fit a drill guide to Krause's arm. Because of the size of Krause's arm and size of the ring selected to place the drill guide on the humerus, the guide failed to rest on her bone. Instead, the drill guide ended approximately one-half inch above the bone. Dr. Gaenslen decided to continue with the surgery, holding the drill guide with his left hand while operating the drill power supply with his right hand. As he increased the speed of the drill, the drill bit skived off of the bone and cut approximately eight centimeters from Krause's radial nerve, which rested at the back of the bone.

¶3 Krause sued Dr. Gaenslen and his medical malpractice insurer, Midwest Medical Insurance Company, alleging that Dr. Gaenslen's negligence caused laceration of Krause's nerve, and alleging alternatively that the injury does not ordinarily occur if proper care and skill are exercised by the surgeon. Krause's expert witness, Dr. Robin Richards, testified that Dr. Gaenslen's conduct fell below the standard of care because his drilling to put in the first pin was not done safely. He further testified that it is not safe to drill into a humerus bone without a guide. Dr. Richards acknowledged that even with a guide it is still possible to drill completely through the bone and injure the nerve on the other side and that the "mechanics of how this injury occurred" are that Dr. Gaenslen drilled with a short guide, that the drill slipped, and the drill then engaged the radial nerve and cut the nerve. Dr. Richards also agreed that based on his review of the medical records, Dr. Gaenslen's deposition, and the deposition of Dr. Gaenslen's expert witness, Dr. Michael Vender, there was no other theory of the mechanics of the injury. Dr. Richards did not testify that this type of injury does not ordinarily occur in the absence of negligence, nor did he say exactly how the specific injury occurred, but he did opine that it would not have occurred without Dr. Gaenslen's negligence.

¶4 The defense did not dispute that Dr. Gaenslen at all times had exclusive control of the drill, nor that the drill skived off the bone and lacerated Krause's radial nerve. The theory of the defense was that this type of surgery is complex and risky, and that the risk of the drill skiving off the bone and injuring a nerve and/or soft tissue was a recognized complication of such surgery even when performed consistent with the standard of care required. Dr. Gaenslen testified that even with a drill sleeve directly on the bone, the drill can still skive off the bone, and that a recognized complication of this type of surgery is to drill through a nerve located behind the humerus when drilling a hole to insert a pin in the

humerus. Dr. Vender stated that the original injury Krause sustained was very unusual and the treatment was also unusual. Dr. Vender stated that these surgeries involved "an increasing level of difficulty … in a complicated arm," that things do go wrong, and that a complication occurs because all surgery has risk and the more complex the surgery, the greater the risk. He noted that there are "curves to these bones that aren't predictable" and expressed the opinion that Dr. Gaenslen provided "state of the art" orthopedic care to Krause, did "everything and more that's reasonable and expected" in preparation of this specific surgery, and exercised the degree of skill, care and judgment required of a reasonable orthopedic surgeon in treating Krause.

¶5 At the conclusion of the evidence, Krause requested that the Wisconsin Jury Instruction on *res ipsa loquitur* in medical negligence[1] be given, in addition to the standard medical negligence jury instruction. The trial court refused to give the *res ipsa loquitur* instruction, stating:

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[1] WISCONSIN JI—CIVIL 1024 states:

> **1024 PROFESSIONAL NEGLIGENCE: MEDICAL: RES IPSA LOQUITUR**
>
> If you find that (name the part of the body that was injured) of (plaintiff) was injured during the course of the operation performed by (doctor) and if you further find (from expert medical testimony in this case) that the injury to the (name the part of the body that was injured) of (plaintiff) is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, you may infer, from the fact of surgery to the (name the part of the body that was injured) of (plaintiff), that (doctor) failed to exercise that degree of care and skill which reasonably prudent surgeons would exercise. This rule will not apply if (doctor) has offered an explanation for the injury to the (name the part of the body that was injured) of (plaintiff) which satisfies you that the injury to (plaintiff) did not occur through any failure on (doctor)'s part to exercise due care and skill.

> As to the res ipsa loquitur, I have been a judge for 27 years. I have never given this instruction anyplace. I remember it from law school. The barrel rolling and hit someone. Well, it rolled. It must, somebody must have been negligent to allow it to roll. I don't know if this is the appropriate case. This is the first time I have ever seen it in a medical malpractice case. I think it is confusing. I think it is contrary to the general instruction. And I think it throws in something that is just going to confuse the jury, and the Court's not going to give it. I don't think it is appropriate. It may be appropriate under certain circumstances. But not under these circumstances where it is clear there are different opinions as to the standard of care. So I will not give res ipsa loquitur.

The jury returned a verdict finding that Dr. Gaenslen was not "negligent with respect to his care and treatment of Barbara A. Krause on May 5, 1999."

¶6 Krause then moved the trial court to change the answers to the negligence and cause questions on the verdict. The trial court denied Krause's motions and Krause appealed.

STANDARD OF REVIEW

¶7 "The doctrine of *res ipsa loquitur* has long been a part of Wisconsin jurisprudence." ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 13-18, 531 N.W.2d 597 (1995) (citing and discussing cases). "*Res ipsa loquitur* is a rule of circumstantial evidence which permits, but does not require, a permissible inference of negligence to be drawn by the jury." ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993). "The doctrine applies where there is insufficient proof available to explain an injury-causing event, yet the physical causes of the accident are of the kind which ordinarily do not exist in the absence of negligence." ***Id.*** "It is settled that the [*res ipsa loquitur*] doctrine may be applied in medical malpractice cases…." ***Hoven v.***

Kelble, 79 Wis. 2d 444, 451-52, 256 N.W.2d 379 (1977). "The failure to give the res ipsa instruction in a medical malpractice case where the evidence warrants it has been found prejudicial in the past." ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 600, 492 N.W.2d 167 (Ct. App. 1992).

> ¶8 A *res ipsa loquitur* instruction should be given when:
>
> (a) either a laymen [sic] is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence,
>
> (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and
>
> (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

Peplinski, 193 Wis. 2d at 17 (formatting modified for readability).

¶9 Giving the *res ipsa loquitur* instruction, in general, is a question of law which we review independently. ***Lecander***, 171 Wis. 2d at 602. The standard of review relates to the three-part conjunctive test for whether it is proper to give the instruction. ***Peplinski***, 193 Wis. 2d at 18-19. The first two requirements are mixed questions of fact and law. ***Id.*** at 19. Thus, we "must first consider whether the trial court's factual findings were clearly erroneous." ***Id.*** If not, then we must consider whether the factual findings fulfill the applicable legal standard. ***Id.*** The third requirement instructs the trial court to make a discretionary determination as to the sufficiency of the evidence. ***Id.*** at 20. Because the trial court is in a better position to weigh the evidence, we review the sufficiency of the evidence question using an erroneous exercise of discretion standard. ***Id.*** Although "the basis for an exercise of discretion should be set forth in the record, it will be upheld if the

appellate court can find facts of record which would support the circuit court's decision." ***Id.***

DISCUSSION

¶10 We analyze the three ***Peplinski*** elements in turn.

A. Does the result not ordinarily occur in the absence of negligence?

¶11 The injury was approximately an eight-centimeter cut in the radial nerve at the elbow. The surgery being performed to repair the seriously injured elbow involved three phases; the third phase of this surgery was when the radial nerve was cut. The damaged nerve is one of several nerves located in the area where the surgery was being performed. Unlike some medical problems, such as surgical instruments left in the body or injury to a shoulder when the patient undergoes surgery for appendicitis, this is not the type of injury which, as a matter of common knowledge, a lay person could say does not ordinarily occur in the absence of negligence. *See* ***Beaudoin v. Watertown Mem'l Hosp.***, 32 Wis. 2d 132, 137, 145 N.W.2d 166 (1966) (citing Prosser, Law of Torts (2d ed.), pp. 210, 211, sec. 42). Three doctors testified in this case. The record does not show that any of them testified that this injury to this nerve does not ordinarily occur in the absence of negligence. Consequently, the first criteria necessary for a *res ipsa loquitur* instruction has not been met.[2]

[2] Although the parties do not discuss this prong of the test set forth in ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 531 N.W.2d 597 (1995), and the trial court likewise did not discuss it, our review of the record persuades us that there was no evidence which tended to establish this element of the required test.

B. Was the instrument causing harm in the exclusive control of the defendant?

¶12 It is undisputed that Dr. Gaenslen at all times had exclusive control of the drill and the surgical procedure. It is undisputed that the drill skiving off the humerus was the cause of the injury. There is no evidence that conduct by any other person, including the sedated plaintiff, contributed in any way to this injury. This element has been established.

C. Does the evidence provide a full and complete explanation of the event?

¶13 The ***Peplinski*** court, in discussing the third "element" of this standard, noted:

> [W]hen both parties have rested and a negligence case is ready for the jury, either of two conditions may exist which would render it error to give the *res ipsa loquitur* instruction. The first occurs when the plaintiff has proved too little—that is, if there has been no evidence which would remove the causation question from the realm of conjecture and placed it within the realm of permissible inferences. The second situation where it is also error occurs when the plaintiff's evidence in a given case has been so substantial that it provides a full and complete explanation of the event if the jury chooses to accept it. In that case the cause is no longer unknown and the instruction will be superfluous and erroneous. However, a middle ground exists between these two extremes where the instruction will still be proper. Professor Prosser describes this situation as follows:
>
> > [T]he introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish a full and complete explanation of the occurrence does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur.

Peplinski, 193 Wis. 2d at 17-18. In determining whether a *res ipsa loquitur* instruction is appropriate under the third factor, we explained: "An instruction on *res ipsa loquitur* is not appropriate where there is 'substantial proof of negligence'—that is, where a mechanism of injury is shown." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 18, 496 N.W.2d 226 (Ct. App. 1993) (citation omitted). However, if a plaintiff cannot point to "specific acts that 'completely explain[] the injury,'" but provides testimony that the "injury would not have occurred had the … procedures been conducted in accord with the applicable standard of care," and it is impossible for plaintiff to be "able to show a specific act of negligence … this [is] a classic *res ipsa loquitur* case." ***Id.*** at 18-19 (citation and footnote omitted).

¶14 Krause argues that she provided two alternative theories for the cause of her injuries which could have been considered by the jury under a *res ipsa loquitur* instruction. The first is that Dr. Gaenslen was negligent in affixing the drill guide so that it was not resting on the humerus bone, as it was designed to do, thus making operation of the drill unsafe. The second theory is that Dr. Gaenslen's operation of the drill was negligent because he increased the speed before the drill was in stable contact with the bone.

¶15 Dr. Gaenslen argues that Krause was not entitled to a *res ipsa loquitur* instruction because Krause's expert, Dr. Richards, testified as to the specific negligent acts which caused Krause's injury, and denied all other possibilities of causation. If the jury accepted Dr. Richards's testimony, it was a complete explanation of the mechanics of the injury. The following testimony by Dr. Richards summarizes his conclusions:

> [DEFENSE COUNSEL]: In terms of the mechanics of how this injury occurred, you're reasonably confident in

> your analysis that it was a sequence of events that involved the drill being placed with a short drill guide, that the drill slipped or skived, to use Dr. Gaenslen's words, that the drill then engaged the radial nerve, the spinning drill then cut the radial nerve and caused the deficits that we've discussed. Is that a fair statement?
>
> [PLAINTIFF'S COUNSEL]: Object to misrepresentation pertaining to a short drill guide. But—
>
> THE COURT: Well, that part may not be part of the evidence.
>
> [DEFENSE COUNSEL]: Well, it's a drill guide that didn't reach the bone. There's no dispute about that.
>
> THE COURT: Well, with that idea.
>
> DR. RICHARDS: I think that's what happened.
>
> [DEFENSE COUNSEL]: Okay. And you're reasonably confident to a reasonable degree of medical probability that those are the medical facts and the causative mechanism in this case, correct?
>
> DR. RICHARDS: Based on the evidence I've read, I think that's what happened.
>
> ….
>
> [DEFENSE COUNSEL]: You're not aware of any dispute in this case by Dr. Gaenslen, the expert witness that we've retained, yourself, or the medical records that would cause someone to think that there's any other theory or mechanism of injury here, are you?
>
> DR. RICHARDS: No.

¶16 Dr. Gaenslen argues that too much evidence was offered to allow for the *res ipsa loquitur* instruction. Dr. Gaenslen argues that his own testimony and that of Drs. Vender and Richards all agree that the mechanism of the injury was that while Dr. Gaenslen was operating the drill with a drill guide that did not reach the bone, the drill skived off the bone and lacerated Krause's radial nerve. Dr. Richards said the cause of skiving was the drill guide not reaching the bone or

improper operation of the drill, which, Dr. Gaenslen argues, presents a full and complete explanation of how the injury occurred, and thus forecloses giving the *res ipsa loquitur* instruction. *See* ***Peplinski***, 193 Wis. 2d at 17.

¶17 Krause argues that after she rested her case-in-chief, and contrary to his prior deposition testimony, Dr. Gaenslen testified that the drill guide was three inches long (rather than the five inches to which he had previously testified), that he could see the drill bit on the bone through another incision, and that he "stabilized the drill bit by grasping the drill [guide] one-half inch above the humerus with his left hand through the medial incision." Because Dr. Richards had no knowledge of this new information when he testified, Krause argues that she did not present a complete and full explanation of the mechanism of the injury because her expert's testimony was without the benefit of the new evidence. We disagree.

¶18 Dr. Gaenslen's change in testimony did not present a new theory of the mechanism of the injury. It remained undisputed that Dr. Gaenslen was still in control of the drill, he still drilled with a guide that did not connect to the bone, and the drill still skived off the bone and cut the nerve. The only evidentiary significance of the changed testimony we discern from the record is its possible effect on the jury's assessment of Dr. Gaenslen's credibility. In the context of the theories of negligence advanced by Krause, the changed testimony had no discernible impact on Dr. Richards's analysis of the mechanism of the injury.

¶19 Our conclusion that the mechanism of the injury was, if believed by the jury, fully explained is consistent in analysis and outcome with numerous prior Wisconsin cases. In ***Utica Mutual Insurance Co. v. Ripon Cooperative***, 50 Wis. 2d 431, 184 N.W.2d 65 (1971), the plaintiff's expert gave a specific cause for

the truck fire at issue: fuel from the fuel line leaked as it entered the carburetor, then dripped on the hot manifold and caught fire. ***Id.*** at 438. The plaintiff's expert further testified that this leak would have been discovered with proper maintenance and inspection of the vehicle. ***Id.*** The supreme court concluded that giving the *res ipsa loquitur* instruction was error because:

> The respondents' expert offered an opinion on exactly where, how and why the fire occurred….
>
> > *There is direct evidence of specific acts of negligence complained of which furnish a complete and full explanation of what caused the injury to the plaintiff*…. This evidence was sufficient to make a prima facie case and support a verdict. We think the plaintiff proved too much by direct evidence of negligence to be entitled to the *res ipsa loquitur* instruction.

Id. at 440 (italics in original; citation omitted). Similarly, in ***Lecander***, when the expert explained that the plaintiff's injury occurred during a nurse's attempt to perform a blind nasal intubation, one of a variety of methods by which the nurse had attempted to intubate the plaintiff before surgery, the court found that the experts' explanation of negligence as to the specific attempt was full and complete. ***Id.***, 171 Wis. 2d at 603. The explanation of the mechanism of injury in this case is similarly detailed and specific.

¶20 A *res ipsa loquitur* instruction is also appropriate in a medical malpractice case where there is expert testimony that the specific act of negligence cannot be identified, but the injury would not occur in the absence of negligence. In ***Fiumefreddo***, two doctors were simultaneously involved in the surgery in which the plaintiff's vocal cord was injured. ***Id.***, 174 Wis. 2d at 15. Both doctors performed tasks in the throat in the area involving the larynx. ***Id.*** The plaintiff's expert opined that the injury could not occur unless one or both of the surgeons

deviated from the standard of care, although no witness could "point[] to any specific act by either surgeon that caused" the injury. ***Id.*** 174 Wis. 2d at 15-16. The trial court refused to give the instruction; we reversed. In this case, unlike in ***Fiumefreddo***, the record shows that Krause's expert did opine as to what specific acts of Dr. Gaenslen he believed caused Krause's injury.

¶21 We conclude that under the ***Peplinski*** elements, Krause has not established, through expert testimony, that the damage to her radial nerve during her third surgery to repair her seriously injured elbow would not have occurred in the absence of negligence. We further conclude, under the third ***Peplinski*** element, that Krause's evidence, through the testimony of her expert witness, provides a full and complete explanation of how her injury occurred, which a jury was entitled to, and did, consider. Accordingly, we determine that the trial court properly refused to give the jury the *res ipsa loquitur* instruction.

By the Court.—Judgment affirmed.

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